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August 5, 1997

**EX PARTE**

EX PARTE OR LATE FILED

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W. Room 222  
Washington, D.C. 20554

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AUG - 5 1997

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Re: CC Docket 95-116, Number Portability

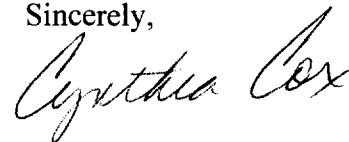
Dear Mr. Caton:

Today, BellSouth sent the attached letter to Mr. Richard Metzger, Mr. Neil Fried, Mr. Len Smith, Mr. Glenn Reynolds and Mr. Steven Teplitz of the Common Carrier Bureau, Mr. Tom Boasberg in Chairman Hundt's office, Mr. Jim Casserly in Commissioner Ness's office, Ms. Kathleen Franco in Commissioner Chong's office and Mr. Paul Gallant in Commissioner Quello's office.

Please include a copy of this letter and the attachment in the record in this proceeding.

In accordance with Commission rules, the original of this letter and one copy are being filed with your office. Acknowledgment and date of receipt are requested. A duplicate of this letter is included for this purpose.

Sincerely,



cc: Richard Metzger (w/o attachment)  
Neil Fried (w/o attachment)  
Len Smith (w/o attachment)  
Glenn Reynolds (w/o attachment)  
Steven Teplitz (w/o attachment)  
Tom Boasberg (w/o attachment)  
Jim Casserly (w/o attachment)  
Kathleen Franco (w/o attachment)  
Paul Gallant (w/o attachment)

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August 5, 1997

Mr. A. Richard Metzger, Jr.  
Deputy Chief, Common Carrier Bureau  
Federal Communications Commission  
1919 M Street N.W.  
Washington, D.C. 20554

RE: CC Docket 95-116, Number Portability

Dear Mr. Metzger:

During our ex parte meeting on Friday, July 25, 1997, BellSouth discussed alternative proposals for number portability cost recovery. During the course of that discussion we agreed to provide a more thorough analysis of the jurisdictional issues regarding number portability cost recovery that resulted from the recent 8th Circuit court decision on the Commission's local interconnection Order.

To summarize BellSouth's alternative cost recovery proposal for number portability, we propose that all Type I and Type II costs be included in a national fund. Such a fund, in our view, is necessary to meet the mandate of the Telecommunications Act of 1996 for competitive neutrality. The national fund would be split into interstate and intrastate components with each allocated based on the relevant retail revenues. The interstate portion of the allocated costs would be given exogenous treatment and recovered accordingly. The intrastate portion of the allocated costs would be recovered from intrastate services. We further believe the FCC should articulate guidelines for intrastate treatment of number portability cost recovery. At a minimum these guidelines should specify:

- the definition of "competitive neutrality" including clarification that all carriers should participate in number portability cost recovery;
- which costs are eligible to be included as Type I and Type II costs;
- that intrastate costs qualify for exogenous treatment;
- that states with Phase I and Phase II MSAs should have a cost recovery plan in place by 6/30/98; remaining states must have plan in place prior to deployment; and,
- number portability costs should be fully recovered over a 3-5 year time period.

As explained in the attached paper, BellSouth does not believe the recent 8th Circuit court decision would preclude the Commission from implementing or enforcing state compliance with such guidelines.

Feel free to call me with any questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Blum". The signature is fluid and cursive, with the first name "Bob" and last name "Blum" clearly distinguishable.

cc: Neil Fried  
Glenn Reynolds  
Len Smith  
Steven Teplitz  
Tom Boasberg  
Jim Casserly  
Kathleen Franco  
Paul Gallant

## **COST RECOVERY FOR NUMBER PORTABILITY**

**After**

**Iowa Utilities Board v. F.C.C., \_\_\_ F.3d \_\_\_ (No. 96-3321, 8th Cir. July 18, 1997)**

### Question Presented

1. In light of the Eighth Circuit's recent decision regarding jurisdiction over pricing for interconnection, can the FCC prescribe guidelines that should be followed by the States in order to ensure competitively neutral cost recovery for long term number portability?

### Answer

Yes. The FCC has jurisdiction to prescribe general guidelines to ensure that the costs of number portability are borne by all carriers on a competitively neutral basis. Such guidelines should not intrude upon a State's ability to set rates for intrastate services.

### Analysis

I. THE COMMISSION HAS AN UNAMBIGUOUS CONGRESSIONAL MANDATE TO ENSURE THAT THE COSTS OF LNP ARE BORNE BY ALL CARRIERS ON A COMPETITIVELY NEUTRAL BASIS.

A. The 1996 Act.

The Telecommunications Act of 1996<sup>1</sup> provides that the cost of establishing number portability "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."<sup>2</sup> Thus, the Commission must determine that all the costs of establishing number portability under section 251(b)(2) of the 1996

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

<sup>2</sup> 47 U.S.C. § 251(e)(2). Number portability is an obligation imposed by the 1996 Act upon all local exchange carriers (LECs). 47 U.S.C. § 251(b)(2).

Act are borne by all telecommunications carriers. The Commission must then determine that this cost bearing is accomplished on a competitively neutral basis.

B. Number Portability Order

On June 27, 1996, the FCC adopted its First Report and Order and Further Notice of Proposed Rulemaking in which it established performance criteria and an implementation schedule for long-term number portability (LNP) pursuant to section 251(b)(2), and adopted a further notice of proposed rulemaking regarding cost recovery for LNP pursuant to section 251(e)(2).<sup>3</sup> It also determined that current technically feasible methods of providing number portability, such as remote call forwarding (RCF) and direct inward dialing (DID) satisfy the definition of number portability set forth in the 1996 Act.<sup>4</sup> Accordingly, the Commission required LECs to provide such “currently available number portability methods,” in accordance with section 251(b), prior to the implementation of LNP.<sup>5</sup>

The Commission determined that its authority to prescribe pricing principles for number portability under section 251(e)(2) is independent of any general authority that may be granted by § 251 over pricing for interconnection.<sup>6</sup>

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<sup>3</sup> Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996)(First Report and Order), First Memorandum Opinion and Order on Reconsideration, FCC 97-74, CC Docket No. 95-116 (Mar. 11, 1997).

<sup>4</sup> 11 FCC Rcd 8409 -10, ¶¶ 110 -111.

<sup>5</sup> The Commission determined that, in addition to section 251(b)(2), it had the jurisdiction to require LEC provision of currently available number portability methods independent of the 1996 Act. *Id.* at 8410-11, ¶ 112.

<sup>6</sup> The Commission argued before the Eighth Circuit that this authority derived from sections 251(d)(1) and 251(c) of the 1996 Act, and several general rulemaking provisions

126. In our interconnection proceeding, we have sought comment on our tentative conclusion that the 1996 Act authorizes us to set pricing principles to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and nondiscriminatory. We need not, however, reach in this proceeding the issue of whether section 251 generally gives us authority for pricing for interconnection because the statute sets forth the standard for the recovery of number portability costs and grants the Commission the express authority to implement this standard. Specifically, section 251(e)(2) requires that the costs of “number portability be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.” We therefore conclude that section 251(e)(2) gives us specific authority to prescribe pricing principles that ensure that the costs of number portability are allocated on a “competitively neutral” basis.<sup>7</sup>

The Commission concluded that the 1996 Act gave it the authority to adopt federal pricing guidelines that states must follow in mandating cost recovery mechanisms for currently available number portability methods.<sup>8</sup>

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of the Communications Act of 1934. Iowa Utilities Board v. FCC, \_\_\_ F.3d \_\_\_, (No. 96-3321, Slip Opinion at 102 (“Iowa Utilities Board”).

<sup>7</sup> Id. at 8417, ¶ 126 (footnotes omitted).

<sup>8</sup> Id. at ¶ 127. BellSouth maintains that RCF and DID are intrastate local exchange services that do not meet the definition of LNP as set forth in the 1996 Act or Telephone Number Portability; therefore, BellSouth has petitioned the Commission to reconsider its exercise of federal pricing authority under § 251(e)(2) to RCF and DID.

II. THE FCC MAY CLEARLY PRESCRIBE FEDERAL NUMBER PORTABILITY COST RECOVERY GUIDELINES TO THE EXTENT THEY DO NOT INTRUDE UPON A STATE'S INTRASTATE RATEMAKING AUTHORITY.

A. The Iowa Utilities Board Decision.

The United States Court of Appeals for the Eighth Circuit concluded that the Federal Communications Commission does not have jurisdiction to issue pricing rules for interconnection, and accordingly vacated the rules promulgated by the Commission last August.<sup>9</sup> The FCC, as noted above, previously determined that its authority to prescribe cost recovery pricing principles for number portability exists independently of any authority it may have to set interconnection prices. The Eighth Circuit noted, however, that “no provision of the [Communications Act, as amended by the 1996] Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements,” while recognizing at the same time that “certain nonpricing provisions of the Telecommunications Act” provide the FCC with “direct and unambiguous grants of intrastate authority”:

For instance, subsection 251(b)(2) burdens LECs with “[t]he duty to provide . . . number portability in accordance with requirements prescribed by the Commission.”<sup>10</sup>

The Court went on to hold that while a federal statute’s mere application to intrastate telecommunication matters is insufficient to confer intrastate jurisdiction upon the FCC, a statute’s direct grant of intrastate authority will overcome the operation of section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b).<sup>11</sup>

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<sup>9</sup> Iowa Utilities Board, \_\_\_ F.3d at \_\_\_, slip op. at 101.

<sup>10</sup> Id. at 108.

<sup>11</sup> Id. at 110.

B. Is section 251(e)(2) a grant of intrastate pricing authority?

It is not entirely clear from the Eighth Circuit's opinion whether it considers Congress's cost recovery mandate contained in section 251(e)(2) to be a direct grant of intrastate authority that unambiguously requires local rates to comply with FCC-prescribed requirements. The Court described the direct grant contained in section 251(b)(2) as a "nonpricing" provision.<sup>12</sup> Although the court generally referred to a number of provisions of the 1996 Act, including section 251(e), in a footnote as "an express call for FCC involvement," the explanatory parenthetical phrase accompanying the citation to section 251(e) is limited to "number administration," the title of the section."<sup>13</sup> Moreover, section 251(e) "Numbering Administration" contains two subparts, which are never referred to explicitly by the court: subpart (1) entitled "Commission Authority and Jurisdiction," and subpart (2), entitled "Costs."<sup>14</sup>

It could be argued that the court's reference to the section 251(e) as a whole necessarily incorporated both of its subsections, including the cost recovery subsection. In that case, the court's general reference to section 251(b)(2) as a "nonpricing" provision would seem to indicate that the Commission's competitive neutrality mandate in subsection (2) is itself a "nonpricing" provision. Coupled with the court's statement that no provision of the Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements, and its acknowledgment of section 276(b) of the 1996 Act which "directly requires the FCC to establish a compensation plan

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<sup>12</sup> Id. at 108

<sup>13</sup> Id. at n. 10.

<sup>14</sup> 47 U.S.C. § 251(e)(2).

regarding both intrastate and interstate payphone calls,”<sup>15</sup> such a reading would counsel against the FCC’s enacting LNP cost recovery guidelines based on section 251(e)(2) that unduly restrict a state’s ability to set rates.

C. General Federal Guidelines Avoid Jurisdictional Entanglements

The Commission should avoid any jurisdictional disputes over pricing. It can do this by promulgating general guidelines to ensure that the Congressional mandate of section 251(e)(2) is carried out, but structuring these guidelines in such a way that pricing in the intrastate jurisdiction is not unduly affected. The Commission, for example, must avoid the approach it took in establishing federal guidelines for state implementation of cost recovery for interim number portability measures such as RCF and DID. Because these guidelines fundamentally restrict state regulation of local exchange service pricing of intrastate services that do not meet the legal requirements for section 251(b)(2) LNP, (by not allowing any price that is not close to zero) this model runs afoul of Iowa Utilities Board.

Question Presented

1. Is BellSouth’s Alternative LNP Cost Recovery Position consistent with the Communications Act of 1934, as amended by the 1996 Act, the Iowa Utilities Board decision, and the Commission’s own number portability proceedings?

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<sup>15</sup> Iowa Utilities Board, \_\_\_ F.3d at \_\_\_, slip op. at 108, citing Illinois Pub. Telecom. Ass’n v. FCC, No. 96-1394, 1997 U.S. App. LEXIS 16147 (D.C. Cir. July 1, 1997).

Answer

Yes. BellSouth's Alternative LNP Cost Recovery Plan comports with section 251(e)(2) by requiring the FCC to provide, either directly through an initial nationwide assessment or indirectly through the following federal guidelines to be administered by the States, that: (1) the costs of number portability include both Type I and Type II section 251(b)(2) costs; (2) both Type I and Type II costs must be borne by all carriers on a competitively neutral basis; (3) these costs must be treated as exogenous in price cap jurisdictions; and (4) cost recovery mechanisms must be in place by June 30, 1998 for Phase I and Phase II MSA States, and prior to the start of LNP implementation in all other States. The general nature of these guidelines carry out Congress's mandate that the costs of establishing number portability are to be borne by all carriers on a competitively neutral basis and permit State implementation of cost recovery without unduly restricting State regulation of intrastate pricing. Recovery of wireless carrier and interstate wireline carrier LNP costs at the federal level, and recovery of intrastate wireline carrier LNP costs at the State level pursuant to these general federal guidelines comports with both the Communications Act, as amended by the 1996 Act, and the Iowa Utilities Board decision.

## Analysis

I. THE COMMISSION HAS AN UNAMBIGUOUS CONGRESSIONAL MANDATE TO DETERMINE HOW SECTION 251(b)(2) LNP COSTS ARE TO BE BORNE BY ALL CARRIERS ON A COMPETITIVELY NEUTRAL BASIS.

Congress has given the FCC the responsibility for determining that all the costs of establishing number portability are to be borne by all telecommunications carriers.<sup>16</sup>

Developing federal guidelines that implement this determination is, in the first instance, clearly within the Agency's scope of regulatory authority. Iowa Utilities Board, slip op. (a statute's direct grant of intrastate authority will overcome the operation of section 2(b) of the Communications Act of 1934).

A. The Key Elements of the Federal Guidelines Advocated by BellSouth are Essential to Ensuring Compliance with Section 251(e)(2).

A federal requirement that both Type I and Type II section 251(b)(2) costs must be reported to a national administrator and be amortized over a 3-5 year period, and requiring carrier contributions to be based on retail revenues, fulfills Congress's mandate that the Commission ensure that the all the costs of establishing LNP be borne by all carriers on a competitively neutral basis.<sup>17</sup> Both Type I and Type II section 251(b)(2) costs must be borne in order for LNP to work; LNP will not work if only Type I costs are borne. Inclusion of both Type I and Type II costs in any LNP cost recovery mechanism is therefore essential to comply with Congress's mandate in section 251(e)(2) that the

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<sup>16</sup> 47 U.S.C. § 251(e)(2).

<sup>17</sup> Id. Type I costs include the costs incurred by the third party administrator to build, operate, and maintain the databases needed to provide LNP. Type II costs are carrier specific costs "directly related" to providing LNP. Telephone Number Portability, 11 FCC Rcd at 8459, ¶ 208.

costs of establishing LNP be borne by all carriers, whether the FCC requires an initial nationwide assessment that includes both type costs, or requires States to make local assessments that include both Type I and Type II costs. Requiring each carrier to bear its own Type II costs would violate Congress's mandate that the costs of establishing number portability be borne by all carriers on a competitively neutral basis.

Providing for exogenous treatment of all section 251(b)(2) LNP costs is also necessary to comport with Congress's section 251(e)(2) mandate for competitively neutral cost allocation. The costs of LNP are classic examples of costs being imposed by governmental (in this case, Congressional) mandate.<sup>18</sup> Further, requiring that an LNP cost recovery mechanism be in place prior to June 30, 1998, in the case of Phase I and Phase II MSAs, and prior to the beginning of LNP in all other states, will remove the competitive handicap will be imposed on the LECs which will incur the vast majority of costs in compliance with Congress's section 251(b)(2) mandate.<sup>19</sup> These guidelines all operate to assure competitively neutral LNP cost allocation without unduly restricting the ability of the appropriate regulatory authority to regulate the prices of telecommunications services over which they are jurisdictionally competent.

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<sup>18</sup> 47 U.S.C. § 251(b)(2) (all LECs must provide section 251(b)(2) LNP as part of their federal interconnection obligations).

<sup>19</sup> The Telephone Number Portability Order requires all LECs to implement LNP in the 100 largest Metropolitan Statistical Areas (MSAs) according to a phased deployment schedule that commences October 1, 1997, and concludes December 31, 1998. Generally, the largest MSAs are to be implemented in the initial phases. Phase I implementation begins on October 1, 1997, Phase II on January 1, 1998, Phase III on April 1, 1998, Phase IV on July 1, 1998 and Phase V on October 1, 1998. 11 FCC Rcd at 8393, ¶ 77 & app. F, recon. FCC 97-94, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116 (Mar. 11, 1997) at 48, ¶ 78 & app. E.

B. Allocating LNP Costs Among Interstate and Intrastate Jurisdictions  
Comports with Current Law.

Requiring that the section 251(b)(2) LNP costs incurred by wireless carriers be recovered in the interstate jurisdiction is consistent with both the Communications Act of 1934, as amended by the 1996 Act, as well as Iowa Utilities Board. As cost recovery for section 251(b)(2) LNP will necessarily implicate the rates wireless carriers can charge, States and local government authority over cost recovery for commercial mobile service or private mobile service providers is generally preempted by the Communications Act.<sup>20</sup> Moreover, as the Eighth Circuit notes, “[b]ecause Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by Commercial Mobile Radio Service (CMRS) providers, and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers.”<sup>21</sup>

Requiring that the nationwide wireline carrier costs for LNP be split into interstate and intrastate components simply reflects how such costs would be jurisdictionally separated to be in compliance with the model the Commission adopted in its Universal Service decision<sup>22</sup> and under the Commission’s current accounting rules. Allowing intrastate assessments to be recovered in the individual state jurisdiction clearly comports

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<sup>20</sup> 47 U.S.C. §§ 152(b), 332(c)(3).

<sup>21</sup> Iowa Utilities Board, \_\_\_ F.3d at \_\_\_, slip op. at 114, n.21.

<sup>22</sup> Federal - State Joint Board on Universal Service, Report and Order, CC Docket 96-145 (released May 8, 1997).

with Iowa Utilities Board. Because the general federal guidelines advocated by BellSouth will not unduly restrict an individual State's ability to regulate rates where it is jurisdictionally competent to do so, no section 2(b) issue is implicated, they are also consistent with the Eighth Circuit's decision.<sup>25</sup>

### Conclusion

BellSouth's Alternative LNP Cost Recovery Position is consistent with both the 1996 Act and the Iowa Utilities Board decision, as well as the Commission's own number portability proceedings.

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<sup>23</sup> Iowa Utilities Board, slip op. at 108.

<sup>24</sup> 11 FCC Rcd at 8460, ¶ 209.

<sup>25</sup> Supra, n. 19 and accompanying text.